IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 942

KEVIN L. DONALDSON, f/k/a
MERTON H. SWEET,

Petitioner,

v.

UNITED STATES, ET AL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 11, 1969
CERTIORARI GRANTED FEBRUARY 27, 1970

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 25, 1968—Petitioners, United States of America and John P. Grady filed its Petition to Enforce Internal Revenue Service Summons against Respondent, Joseph J. Mercurio.

November 29, 1968—Petitioners filed an Order to Show Cause against Respondent, Joseph J. Mercurio; the Court entered its order setting for hearing the Order to Show Cause.

December 9, 1968—Intervenor, Kevin L. Donaldson, filed his Motion to Intervene as Respondent and Answer.

December 9, 1968—Respondent, Joseph J. Mercurio, filed his Response to Petition.

January 10, 1969—Petitioners, United States of America and John P. Grady, filed its Opposition to Motion to Intervene.

January 10, 1969—Hearing was had on Kevin L. Donaldson's Motion to Intervene as Respondent.

January 16, 1969—The Court entered its order denying Kevin L. Donaldson's Motion to Intervene.

January 16, 1969—The Court entered its order directing Respondent, Joseph J. Mercurio, to comply with the Internal Revenue Summons.

January 16, 1969—Intervenor, Kevin L. Donaldson, filed a Motion to Stay the Effective Date of the Court's Order Pending Appeal. This Motion was granted on said date.

January 16, 1969—Intervenor, Kevin L. Donaldson, filed his Notice of Appeal.

January 17, 1969—Petitioner, United States of America, filed a Motion to Consolidate.

January 20, 1969—The Court entered its order granting consolidation for purpose of appeal.

(Revelant docket entries in Acme Circus Operating Company, Inc. are identical to those set forth above.)

October 30, 1969—Opinion and Judgment of the Court of Appeals for the Fifth Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

UNITED STATES OF AMERICA and JOHN P. GRADY, *Petitioner,*

v.

JOSEPH J. MERCURIO, *Respondent.*

No. 68-490—Civ. T.

PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

Filed Nov. 25, 1968.

The United States of America and John P. Grady, by and through their attorney, Edward F. Boardman, United States Attorney for the Middle District of Florida, and show unto this Court as follows:

I

This is a proceeding brought under authority of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, to judicially enforce an Internal Revenue Service summons.

II

The petitioner, John P. Grady, is a Special Agent of the Internal Revenue Service employed in the Intelligence Division of the Office of the District Director of Internal Revenue in Tampa, Florida.

III

The respondent, Joseph J. Mercurio maintains a business address at 713 South Orange Avenue, Sarasota, Florida.

IV

The petitioner, John P. Grady, is assisting in an investigation being conducted by Special Agent Bruce B. Miller for the purpose of ascertaining the correct income tax liability of Merton H. Sweet, a/k/a Kevin L. Donaldson, for the years 1964 through 1967, inclusive, as is set out in Exhibit A.

V

On September 12, 1968, an Internal Revenue Service summons, a copy of which is attached hereto as Exhibit B, was issued by Special Agent John P. Grady, directing the respondent, Joseph J. Mercurio, to appear at Room 112, Federal Building, 111 South Orange Avenue, Sarasota, Florida, before Special Agent John P. Grady on September 23, 1968, at 3:00 p.m., to testify and to produce for examination certain books, records, and papers, all of which are described in the summons attached hereto as Exhibit B. Said summons was personally served on respondent, Joseph J. Mercurio on September 12, 1968, as is set out in the affidavit of Special Agent John P. Grady, attached hereto as Exhibit C.

VI

Thereafter, on September 13, 1968, in Civil Action No. 68-373-T United States District Judge Ben Krentzman entered an order restraining the respondent, Joseph J. Mercurio, from complying with the summons herein involved until ordered to do so by a Court of competent jurisdiction.

VII

On September 23, 1968, the respondent failed to comply with the summons attached hereto as Exhibit B because of the restraining order described in paragraph VI above.

WHEREFORE, the petitioners United States of America and John P. Grady, respectfully pray:

1. That the Court enter an order directing the respondent Joseph J. Mercurio, to show cause, if any he has, why he should not comply with and obey the summons attached hereto as Exhibit B in each and every requirement thereof.

2. That this Court order the respondent, Joseph J. Mercurio, to appear for the purpose of giving testimony concerning the tax liability of Merton H. Sweet, a/k/a Kevin L. Donaldson, as to each or any of the tax years 1964 through 1967; and that this Court order the attendance and production of the records, as is required and called for by the terms of the summons, before the petitioner, John P. Grady, or any other proper officer of the Internal Revenue Service at such time and place as may be hereafter fixed by said John P. Grady, or any other proper officer of the Internal Revenue Service.

3. That this Court grant such other relief it deems appropriate in the premises.

EDWARD F. BOARDMAN
United States Attorney
By: /s/ Thomas G. Wilson
THOMAS G. WILSON
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail this 25th day of November, 1968, to: Edward H. Heller, Esquire, 615 Madison, Tampa, Florida, Attorney for Merton H. Sweet, a/k/a Kevin L. Donaldson.

/s/ Thomas G. Wilson
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

EXHIBIT A

AFFIDAVIT OF BRUCE B. MILLER
Filed Nov. 25, 1968

[Caption Omitted in Printing]

STATE OF LOUISIANA }
PARISH OF ORLEANS } SS

BRUCE B. MILLER, being first duly sworn, deposes and says:

1. He is a Special Agent employed in the Intelligence Division of the Office of the District Director of Internal Revenue in New Orleans, Louisiana.

2. In his capacity as Special Agent, he is conducting an investigation for the purpose of ascertaining the correct income tax liability of Merton H. Sweet, a/k/a Kevin L. Donaldson for the years 1964 through 1967, inclusive.

3. As part of the aforesaid investigation, he requested that the Office of the District Director in Jacksonville, Florida, assist him in obtaining information regarding the financial transactions between the Acme Circus Operating Company and the taxpayer Merton H. Sweet, a/k/a Kevin L. Donaldson.

4. As part of this investigation the Internal Revenue Service summons attached hereto as Exhibit B was issued and served.

5. It is necessary to examine the books, papers and other records listed in the Internal Revenue Service summons attached hereto as Exhibit B and to take the testimony of Joseph J. Mercurio in order to ascertain the correct income tax liability of Merton H. Sweet, a/k/a Kevin L. Donaldson, for the years 1964 through 1967, inclusive.

/s/ Bruce B. Miller
BRUCE B. MILLER
Affiant

Subscribed and sworn to before me this 18th day of November, 1968.

/s/ Carl A. Dengel
NOTARY PUBLIC

In and for said state and parish
My commission expires:
CARL A. DENGEL

Notary Public, Parish of Orleans, State of La.
My Commission is issued for life.

EXHIBIT B

Form 2039
(Rev. Nov. 1965)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

SUMMONS

In the matter of the tax liability of

Merton H. Sweet
a/k/a Kevin L. Donaldson
2444 Primeaux Drive, Apt. 94
New Orleans, Louisiana 70114

Internal Revenue District of New Orleans

PERIOD(S) 1964 through 1967

THE COMMISSIONER OF INTERNAL REVENUE

TO: Joseph J. Mercurio
713 South Orange Avenue
AT: Sarasota, Florida

GREETINGS:

You are hereby summoned and required to appear before me an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth:

The following records in your possession of Acme Circus Operating Company, Inc., d/b/a Clyde Beatty-Cole Bros. Circus, that relate to Merton H. Sweet, a/k/a Kevin L. Donaldson:

1. Copies of any applications for employment and/or any other records containing background data including Social Security number furnished you by Merton H. Sweet, a/k/a Kevin L. Donaldson.

2. Copies of any and all contracts between Merton H. Sweet, a/k/a Kevin L. Donaldson, and the Acme Circus Operating Company, Inc., and between Merton H. Sweet, a/k/a Kevin L. Donaldson, and the various organizations sponsoring performances of the circus in their respective cities during the years 1964 through 1967, inclusive.

(See Next Page)

Place and time for appearance:

At Room 112, Federal Building, 111 South Orange Avenue, Sarasota, Florida 33577

on the 23 day of September

19 68, at 3:00 o'clock P. M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code

this 12 day of September, 19 68

ORIGINAL

SIGNATURE: John P. Grady

TITLE: JOHN P. GRADY
Special Agent

6

RTIFICATE OF SERVICE OF SUMM 'NS

(Pursuant to Section 7603, Internal Revenue Co

I hereby certify that I served the summons on the reverse hereof

DATE SUMMONS SERVED (Day, month, year)	TIME
Sept. 12 1962	2:45 P.M.

HOW SUMMONS WAS SERVED (Check one)

☒ I handed an attested copy thereof to the person to whom it was directed,

Mr. Joseph J. Maurer

☐ I left an attested copy thereof with the following person at the last and usual place of abode of the person to whom it is directed,

SIGNATURE	TITLE
John P. Reidy	Special Agent

Sec. 7603. SERVICE OF SUMMONS.

A summons issued under section 6420(e)(2), 6421(f)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

In Re: Merton H. Sweet
a/k/a Kevin L. Donaldson
2448 Primeaux Drive, Apt. 94
New Orleans, Louisiana, 70114 (cont'd)

3. Copies of all Forms 1099 and Forms W-2 issued to Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1958 through 1967, inclusive.

4. A transcript or schedule setting forth the date, [illegible] and purpose of each payment made to Mer[illegible] Sweet, a/k/a Kevin L. Donaldson, by the organizations sponsoring performances of the circus during the years 1964 through 1967, inclusive.

5. Copies of all cancelled checks, cash vouchers or other records relating to payments to Merton H. Sweet, a/k/a Kevin L. Donaldson, for any purpose by Acme Circus Operating Company, Inc., during the years 1964 through 1967, inclusive.

6. Transcript or schedule or other records containing or relating to the purpose of each cancelled check issued by Acme Circus Operating Company, Inc. to Merton H. Sweet, a/k/a Kevin L. Donaldson, for any purpose for the years 1964 through 1967, inclusive.

7. Copies of all expense vouchers submitted by Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1964 through 1967, inclusive.

8. Copies of any records containing information relating to the identification of each sponsoring organization and city where Merton H. Sweet, a/k/a Kevin L. Donaldson, promoted the Clyde Beatty-Cole Bros. Circus during the years 1964 through 1967, inclusive.

9. Copies of correspondence or other records relating to the foregoing or to any other financial transactions between Acme Circus Operating Company, Inc. and Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1964 through 1967, inclusive.

/s/ John P. Grady

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

EXHIBIT C

AFFIDAVIT OF JOHN P. GRADY
Filed Nov. 25, 1968

[Caption Omitted in Printing]

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH } SS

JOHN P. GRADY, being first duly sworn, deposes and says:

1. He is a Special Agent employed in the Intelligence Division of the District Director of Internal Revenue in Tampa, Florida;

2. In his capacity as Special Agent, he is assisting in the conduct of an investigation for the purpose of ascertaining the correct income tax liability of Merton H. Sweet, a/k/a Kevin L. Donaldson, for the years 1964 through 1967, inclusive;

3. As part of the aforesaid investigation, on September 12, 1968, he issued an Internal Revenue Service summons to Joseph J. Mercurio directing him to appear before him at Room 112, Federal Building, 111 South Orange Avenue, Sarasota, Florida, on September 23, 1968, and to produce for examination —

> "The following records in your possession of Acme Circus Operating Company, Inc., d/b/a Clyde Beatty-Cole Bros. Circus, that relate to Merton H. Sweet, a/k/a Kevin L. Donaldson:
>
> 1. Copies of any applications for employment and/or any other records containing back-

ground data including Social Security number furnished you by Merton H. Sweet, a/k/a Kevin L. Donaldson.

2. Copies of any and all contracts between Merton H. Sweet, a/k/a Kevin L. Donaldson, and the Acme Circus Operating Company, Inc., and between Merton H. Sweet, a/k/a Kevin L. Donaldson, and the various organizations sponsoring performances of the circus in their respective cities during the years 1964 through 1967, inclusive.

3. Copies of all Forms 1099 and Forms W-2 issued to Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1958 through 1967, inclusive.

4. A transcript or schedule setting forth the date, amount and purpose of each payment made to Merton H. Sweet, a/k/a Kevin L. Donaldson, by the organizations sponsoring performances of the circus during the years 1964 through 1967, inclusive.

5. Copies of all cancelled checks, cash vouchers or other records relating to payments to Merton H. Sweet, a/k/a Kevin L. Donaldson, for any purpose by Acme Circus Operating Company, Inc., during the years 1964 through 1967, inclusive.

6. Transcript or schedule or other records containing or relating to the purpose of each cancelled check issued by Acme Circus Operating Company, Inc. to Merton H. Sweet, a/k/a Kevin L. Donaldson, for any purpose for the years 1964 through 1967, inclusive.

7. Copies of all expense vouchers submitted by Merton H. Sweet, a/k/a Kevin L. Donald-

son, during the years 1964 through 1967, inclusive.

8. Copies of any records containing information relating to the identification of each sponsoring organization and city where Merton H. Sweet, a/k/a Kevin L. Donaldson, promoted the Clyde Beatty-Cole Bros. Circus during the years 1964 through 1967, inclusive.

9. Copies of correspondence or other records relating to the foregoing or to any other financial transactions between Acme Circus Operating Company, Inc. and Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1964 through 1967, inclusive."

and directing said Joseph J. Mercurio to testify concerning the tax liability of said Merton H. Sweet, a/k/a Kevin L. Donaldson, as to each or any of the years 1964 through 1967. A copy of said summons is attached to these pleadings as Exhibit B.

4. On September 12, 1968, he served the Internal Revenue Service summons described in paragraph 3 above on the respondent, Joseph J. Mercurio, by personally handing an attested copy thereof to the respondent, Joseph J. Mercurio.

5. On September 23, 1968, the respondent failed to comply with the summons because of the restraining order entered by the Federal District Court for the Middle District of Florida in Civil Action No. 68-373-Civ.-T. The respondent's refusal to comply with the summons continues to the date of this affidavit.

6. It is necessary to examine all the books, papers and records demanded in the summons and to take the testimony of the respondent, Joseph J. Mercurio, in order

to ascertain the correct income tax liability of Merton H. Sweet, a/k/a Kevin L. Donaldson, for the years 1964 through 1967, inclusive.

/s/ John P. Grady
JOHN P. GRADY
Affiant

Subscribed and sworn to before me this 25th day of November, 1968.

/s/ Vera E. Atkins
NOTARY PUBLIC
In and for said state and county

My Commission expires: Oct. 26, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

ORDER TO SHOW CAUSE

Filed Nov. 29, 1968

[Caption Omitted in Printing]

Upon the petition, the exhibit attached thereto, the affidavits of John P. Grady, Special Agent of the Internal Revenue Service, and Bruce B. Miller, Special Agent of the Internal Revenue Service, and upon the motion of the United States Attorney, Edward F. Boardman, United States Attorney for the Middle District of Florida:

IT IS ORDERED that Joseph J. Mercurio appear before the United States District Court for the Middle District of Florida in that branch thereof presided over by the undersigned in his courtroom in the United States Courthouse in Tampa, Florida, on December 20th, 1968, at 4 p.m., to show cause why he should not comply with and obey the Internal Revenue Service summons served upon him on September 12, 1968, by Special Agent John P. Grady by producing the records demanded and testifying to the extent called for by said summons.

IT IS FURTHER ORDERED that said respondent and any other interested person shall file a written response to said petition within ten (10) days after service of said petition and attached exhibits.

That a copy of this order together with the petition, the affidavits, and the exhibit attached thereto be served upon Joseph J. Mercurio.

DATED at Tampa, Florida, this 29 day of November, 1968.

/s/ Ben Krentzman
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

MOTION TO INTERVENE AS RESPONDENT

Filed Dec. 9, 1968

[Caption Omitted in Printing]

NOW COMES the Intervenor, Kevin L. Donaldson, and respectfully moves this Court pursuant to Rule 24(a) (2), Federal Rules of Civil Procedure, for leave to intervene as a respondent in this action in order to assert the defenses set forth in his proposed Answer, a copy of which is attached hereto.

The grounds upon which the Intervenor relies in support of his request are:

1. This action is one to judicially enforce an Internal Revenue summons issued by individual Petitioner, John P. Grady, Special Agent, attached and incorporated as Exhibit B in the Petition. This summons seeks to compel Respondent's testimony and the production of records by him purportedly relating to the tax liability or the collection of the tax liability of Kevin L. Donaldson, the Intervenor.

2. Kevin L. Donaldson, the Intervenor, has an interest relating to the transactions which are the subject of this action and is so situated that the disposition of this action may, as a practical matter, impair or impede his ability to protect that interest unless the Intervenor's interest is adequately represented by existing parties, in that a judgment of this Court may adversely and prejudicially effect the substantial rights and privileges se-

cured to him by the Constitution of the United States, as will more definitely appear from the Intervenor's proposed Answer, a copy of which is attached hereto.

3. The tax liability, if any, which is purportedly under investigation by the individual Petitioner and Bruce B. Miller, Special Agent, New Orleans, Louisiana and the taxes if any, which hereafter may be alleged to be due to the United States, will be taxes imposed upon Kevin L. Donaldson, the Intervenor.

WHEREFORE, Kevin L. Donaldson, the proposed Intervenor, respectfully requests an Order of the Court directing that he be permitted to intervene in the above entitled matter and that he be given notice of all subsequent proceedings in this matter and be furnished with copies of all subsequent pleadings through the offices of his attorneys, Louis L. Meldman - Robert E. Meldman, whose post office address is 811 East Wisconsin Avenue, Milwaukee, Wisconsin 53202 and Edward H. Heller, whose post office address is Suite 615, Marine Bank Building, Tampa, Florida.

Dated at Milwaukee, Wisconsin this 6th day of December, 1968.

LAW OFFICES
LOUIS L. MELDMAN
ROBERT E. MELDMAN
811 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

By /s/ Robert E. Meldman
Robert E. Meldman
Attorneys for Intervenor

Local Counsel:
Edward H. Heller
Suite 615, Marine Bank Building
Tampa, Florida

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

ANSWER

[Caption Omitted in Printing]

Filed Dec. 9, 1968

Kevin L. Donaldson, Intervenor, in response to the Petition filed in the above entitled case, respectfully answers and states as follows:

I.

Denies the allegations contained in Paragraph I of the Petition.

II.

Admits the allegations contained in Paragraph II of the Petition.

III.

Admits the allegations contained in Paragraph III of the Petition.

IV.

Denies the allegations contained in Paragraph IV of the Petition.

V.

Admits the allegations contained in Paragraph V of the Petition.

VI.

Admits the allegations contained in Paragraph VI of the Petition.

VII.

Admits the allegations contained in Paragraph VII of the Petition.

VIII.

Denies generally and specifically each and every allegation contained in the Petition not heretofore expressly admitted, qualified or denied.

FURTHER ANSWERING the Petition and as a defense to the allegation that the individual Petitioner and Bruce B. Miller, Special Agent, New Orleans, Louisiana, have been conducting an investigation to determine the income tax liability of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967, the Intervenor alleges affirmatively as follows:

IX.

Petitioner, John P. Grady, Special Agent and Bruce B. Miller, Special Agent, New Orleans, Louisiana, are guilty of bad faith both with the Court and the Intervenor in asserting that they have been conducting an investigation to ascertain the correct income tax liability of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967.

X.

John P. Grady is a Special Agent assigned to the Intelligence Division, Internal Revenue Service, Tampa, Florida and Bruce B. Miller is a Special Agent assigned to the Intelligence Division, Internal Revenue Service, New Orleans, Louisiana.

XI.

The function of the Intelligence Division is to enforce the criminal statutes applicable to tax laws by developing information concerning alleged criminal violations thereof.

XII.

Special Agent Bruce B. Miller was assigned the investigation of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967 for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States and Special Agent John P. Grady is assisting Special Agent Miller in this investigation.

XIII.

An administrative summons may be issued under and pursuant to the provisions of Title 26, United States Code, Section 7602 for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any Internal Revenue tax, or the liability at law or in equity of any transferee or fiduciary of any person in respect of any Internal Revenue tax, or collecting any such liability.

XIV.

As a result of the facts alleged in Paragraphs IX through XIII, inclusive above, the administrative summons issued by the Petitioner, John P. Grady, Special Agent, to Respondent, Joseph J. Mercurio, was not issued for any of the purposes enumerated in Title 26, United States Code, Section 7602 and no proceedings may be brought under the authority of Title 26, United States Code, Section 7402(b) and/or Section 7602(a) to judicially enforce such Internal Revenue summons.

FURTHER ANSWERING the Petition and as a defense to the allegation that testimony concerning, and production for examination of, various books, records and papers in the possession of the Respondent, Joseph J.

Mercurio, relate to the tax liability of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967, the Intervenor alleges affirmatively as follows:

XV.

The request made by the administrative summons served upon the Respondent was overly broad, sweeping and indefinite, without a showing of particularized relevancy or bearing upon the determination of the correct tax liability of Kevin L. Donaldson.

XVI.

Special Agents John P. Grady and Bruce B. Miller were without personal knowledge of the existence of any or* all of the testimony and/or records required by the administrative summons.

XVII.

Records and testimony required by an administrative summons issued under and pursuant to the provisions of Title 26, United States Code, Section 7602, must be particularly described and be relevant to or bear upon the income tax liability of the taxpayer.

XVIII.

As a result of the facts alleged in Paragraphs XV through XVII, inclusive above, the administrative summons issued by individual Petitioner John P. Grady, Special Agent, to Respondent Joseph J. Mercurio, does not come within the limited scope of Title 26, United States Code, Section 7602, as defined in the well-settled judicial decisions of the Courts of the United States and no proceedings may be brought to enforce such summons.

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*Corrected per Amendment of Answer filed December 13, 1968.

FURTHER ANSWERING the Petition and as a defense to the allegations that it is necessary to examine all of the books, papers and records demanded in the summons attached to the Petition as Exhibit B and to take the testimony of the Respondent in order to ascertain the correct income tax liability of Kevin L. Donaldson for the years 1964, 1965, 1966 and 1967, the Intervenor alleges affirmatively as follows:

XIX.

Kevin L. Donaldson, the Intervenor, the subject of a criminal investigation, accorded all of the rights, privileges and guarantees by the Constitution of the United States, is entitled to be secure in his personal papers and personal effects from unreasonable searches and seizures and cannot be required to give testimony which might tend to incriminate him of violation of any criminal law of the State of Louisiana or the United States of America.

XX.

As a result of the facts alleged in Paragraph XIX above, and in consideration of the fact that Intervenor, Kevin L. Donaldson, filed his Petition and Motion for Restraining Order, which Order was granted by the United States District Court, Middle District of Florida, Tampa Division,* restraining Respondent and all of his attorneys, agents, employees and officers from complying with the oral request of John P. Grady, Special Agent, Internal Revenue Service, for certain books, records and papers relating to Intervenor's tax liability or with the summons issued directing the Respondent to appear and give testimony and produce the books, records and papers relating to Intervenor's tax liability, as objections to John P. Grady, Special Agent, in his capacity as Hearing Of-

*As corrected.

ficer, objecting to the enforcement of the oral request and the administrative summons on the grounds that the use of the information sought by the oral request and summons would violate Intervenor's Constitutional rights and privileges, the administrative summons may not be judicially enforced.

WHEREFORE, the Intervenor respectfully prays:

1. That the Court enter an Order dismissing the Petition herein.

2. That the Court permanently enjoin and restrain the Respondent from complying with each and every requirement of the administrative summons, the subject of this action, or any other summons which may be issued or served subsequently directing the Respondent to appear and give testimony and/or produce the same or similar books, records or papers.

3. That the Intervenor recover his costs in this action.

4. That the Court render such other and further relief as is just and proper.

LAW OFFICES
LOUIS L. MELDMAN
ROBERT E. MELDMAN
811 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

By /s/ Robert E. Meldman
Robert E. Meldman
Attorneys for Intervenor

Local Counsel:
Edward H. Heller
Suite 615, Marine Bank Building
Tampa, Florida

[Affidavit of Mailing Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

RESPONSE TO PETITION
Filed Dec. 9, 1968

[Caption Omitted in Printing]

JOSEPH J. MERCURIO, by and through his attorneys, for written response to the Petitioners' petition to enforce Internal Revenue Service summons says that:

1. He admits the allegations contained in Paragraph I of said petition.

2. He admits the allegations contained in Paragraph II of said petition.

3. He admits the allegations contained in Paragraph III of said petition.

4. He is without knowledge as to the allegations contained in Paragraph IV of said petition except as disclosed by the exhibits to said petition.

5. He admits the allegations contained in Paragraph V of said petition.

6. He admits the allegations contained in Paragraph VI of said petition.

7. He admits the allegations contained in Paragraph VII of said petition.

8. For further response, the Respondent would show the Court that were it not for the said Preliminary Injunction entered on September 13, 1968 in Civil Action No. 67-373 Civ. T, the Respondent would have com-

plied with the summons attached to said petition as Exhibit B to the best of his ability. A copy of a certified copy of said Preliminary Injunction is attached hereto as Exhibit A.

/s/ MONTE K. MARSHALL
of Williams, Parker, Harrison, Dietz & Getzen, Attorneys for Respondent
P. O. Box 3258
1538 State Street
Sarasota, Florida

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

MERTON H. SWEET, a/k/a KEVIN L. DONALDSON, *Petitioner and Movant,*

vs.

JOSEPH J. MERCURIO, Accountant for Acme Circus Operating Company, Inc., d/b/a Clyde Beatty-Cole Bros. Circus, *Respondent.*

No. 68-373—Civ. T.

EXHIBIT A

PRELIMINARY INJUNCTION

Filed Sept. 13, 1968

This matter came on for consideration upon the pending expiration of the Court's Order to Show Cause and Temporary Restraining Order entered in this cause on the 3rd day of September, 1968. The Court has considered the various documents filed in this cause and is further advised by counsel for those involved. The following specifics shall be and are the Court's findings:

1. This matter was presented to the Court upon the verified petition and affidavit of Merton H. Sweet, a/k/a [sic] Kelvin L. Donaldson and the affidavit of petitioner's attorney reciting that all reasonable efforts had been undertaken to notify the respondent and his attorney of petitioner's application for a temporary restraining order.

2. The petitioner clearly demonstrated that immediate and irreparable injury, damage, or loss would result to him before the respondent or his

attorney could be heard in opposition. These facts alleged are as follows:

(a) Respondent, Joseph J. Mercurio, would comply with the requests made by John Grady, Special Agent for the Internal Revenue Service, for examination of certain books and records relating to transactions with petitioner between and during the years 1964 and through 1967.

(b) The information sought is in violation of petitioner's rights under the United States Constitution.

(c) Respondent could not adequately represent petitioner's interest in asserting petitioner's Constitutional rights and privileges.

(d) Petitioner may be bound subsequently by the acts of the respondent.

(e) The information sought relates to a criminal investigation of the income tax liabilities of petitioner and may be used against him in a criminal prosecution relating to the Revenue Laws.

(f) The materials sought are not material or relevant to a lawful subject of inquiry and cannot be investigated under authority of statutes of the United States; and,

(g) Security for payment of costs and damages has been given in an amount deemed proper by the Court.

3. The Court's Order to Show Cause and Temporary Restraining Order was entered at 3:30 p.m. on the 3rd day of September, 1968. Said order afforded respondent

opportunity to be heard and to SHOW CAUSE WHY a restraining order should not be issued to restrain him from complying with requests made by the Internal Revenue Service. The hearing was set for 1:30 p.m., September 11, 1968.

4. Respondent was personally served with a copy of the order on the 5th day of September, 1968.

5. On September 10, 1968, respondent, through his attorney, Monte K. Marshall filed a Response and Request for Damages directed against the petitioner.

6. On the same day the Court received correspondence by letter from petitioner's attorney in Tampa, Edward H. Heller, indicating that the above Response and Request for Damages would be withdrawn.

7. On the 11th day of September, 1968 a withdrawal of response and request for damages was filed with the Court by Mr. Marshall, one of respondent's attorneys.

8. On this day also a stipulation was filed with the Court reciting that respondent had no objection to the temporary restraining order being entered against him. The stipulation further recited that respondent would not comply with the requests of the Special Agent of the Internal Revenue Service until such time as ordered by a court of competent jurisdiction. The stipulation was signed on behalf of respondent by one of his attorneys, Fred J. Mancinik.

It appears to the court that respondent would cause immediate and irreparable injury, loss or damage to the petitioner if he presently complies with the requests made by the Internal Revenue Service; compliance appears to threaten a violation of petitioner's Constitutional rights.

IT IS, THEREFORE, ORDERED AND ADJUDGED:

That the respondent and all of his attorneys, agents, employees and officers past and present be temporarily enjoined and restrained from complying with the request by John Grady, Special Agent for the Internal Revenue Service, for the certain books, records and papers sought relating to the petitioner's tax liability or with any summons which may be issued subsequently directing the respondent to appear and give testimony and/or produce the same or similar books, records and papers relating to petitioner's tax liability, until such time as an order of a court of competent jurisdiction has been issued requiring such compliance.

DONE and ORDERED at Tampa, Florida, this 13th day of September, 1968.

BEN KRENTZMAN
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

I certify the foregoing to be a true and correct copy of the original.

Wesley R. Thies, Clerk
United States District Court
Middle District of Florida

By: /s/ Robert H. Cook
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

OPPOSITION TO MOTION TO INTERVENE

Filed Jan. 10, 1969

[Caption Omitted in Printing]

Comes now the United States of America, by and through its attorney, Edward F. Boardman, United States Attorney for the Middle District of Florida, and moves this Court to deny Kevin L. Donaldson, a/k/a Merton H. Sweet's Motion to Intervene and as grounds therefor would respectfully show the Court as follows:

I

That movant herein, Kevin L. Donaldson, a/k/a Merton H. Sweet, has no legal, equitable, possessory, or other interest in the records subject of this summons enforcement proceeding.

II

That said movant has no standing to object to the enforcement of the subject summons and, accordingly, his intervention would afford him no relief.

III

That the movant will not be bound by any judgment rendered herein.

IV

That said movant seeks through intervention to raise issues which are unnecessary, improper and inappropri-

ate for hearing in this cause, all such issues being properly raised in another cause at another time.

V

That movant's intervention would unduly delay and encumber the expeditious adjudication of the rights of the original parties.

Respectfully submitted,

EDWARD F. BOARDMAN
United States Attorney

By: /s/ Thomas G. Wilson
THOMAS G. WILSON
Assistant United States Attorney

/s/ E. Grady Jolly, Jr.
E. GRADY JOLLY, JR.
Trial Attorney
Department of Justice
Washington, D. C.

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

UNITED STATES OF AMERICA and
JOHN P. GRADY, *Petitioners*

vs.

JOSEPH J. MERCURIO, *Respondent,*

KEVIN L. DONALDSON, f/k/a MERTON H. SWEET, *Applicant for Intervention*

Civ. T.
No. 68-490

ORDER

Filed Jan. 16, 1969

THIS CAUSE came on for consideration upon the filing by the Applicant for Intervention, Kevin L. Donaldson, of a Motion to Intervene as Respondent.

The Court has considered the motion and memoranda filed in the cause, heard argument of counsel, and is otherwise fully advised in the premises.

It is therefore, upon consideration,

ORDERED and DECREED:

That the Motion to Intervene be, and the same is hereby, DENIED.

DONE and ORDERED at Tampa, Florida, this 16th day of January, 1969.

/s/ Joseph P. Lieb
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

UNITED STATES OF AMERICA and JOHN P. GRADY, *Petitioners,*

v.

JOSEPH J. MERCURIO, *Respondent.*

No. 68-490—Civ. T.

ORDER

Filed Jan. 16, 1969

The above-entitled and numbered cause, having come before this Court for hearing on this Court's Order to Show Cause directing that the respondent, Joseph J. Mercurio, appear to show cause why he should not be compelled to produce records and testify as demanded in the Internal Revenue Service summons served on him September 12, 1968, by the petitioner, John P. Grady, and after having considered the pleadings filed herein, the testimony of witnesses, and the argument of counsel, it is

ORDERED, ADJUDGED, AND DECREED that Joseph J. Mercurio, appear before Special Agent John P. Grady at a place mutually agreeable between petitioner and Joseph J. Mercurio on January 31, 1969, at 10 a.m. to testify and produce for examination and copying the following described records in his possession of Acme Circus Operating Company, Inc., d/b/a Clyde Beatty-Cole Bros. Circus, that relate to Merton H. Sweet, a/k/a Kevin L. Donaldson:

1. Copies of any applications for employment and/or any other records containing background data

including Social Security number furnished you by Merton H. Sweet, a/k/a Kevin L. Donaldson.

2. Copies of any and all contracts between Merton H. Sweet, a/k/a Kevin L. Donaldson, and the Acme Circus Operating Company, Inc., and between Merton H. Sweet, a/k/a Kevin L. Donaldson, and the various organizations sponsoring performances of the circus in their respective cities during the years 1964 through 1967, inclusive.

3. Copies of all Forms 1099 and Forms W-2 issued to Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1958 through 1967, inclusive.

4. A transcript or schedule setting forth the date, amount and purpose of each payment made to Merton H. Sweet, a/k/a Kevin L. Donaldson, by the organizations sponsoring performances of the circus during the years 1964 through 1967, inclusive.

5. Copies of all cancelled checks, cash vouchers or other records relating to payments to Merton H. Sweet, a/k/a Kevin L. Donaldson, for any purpose by Acme Circus Operating Company, Inc., during the years 1964 through 1967, inclusive.

6. Transcript or schedule or other records containing or relating to the purpose of each cancelled check issued by Acme Circus Operating Company, Inc. to Merton H. Sweet, a/k/a Kevin L. Donaldson, for any purpose for the years 1964 through 1967, inclusive.

7. Copies of all expense vouchers submitted by Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1964 through 1967, inclusive.

8. Copies of any records containing information relating to the identification of each sponsoring organization and city where Merton H. Sweet, a/k/a Kevin L. Donaldson, promoted the Clyde

Beatty-Cole Bros. Circus during the years 1964 through 1967, inclusive.

9. Copies of correspondence or other records relating to the foregoing or to any other financial transactions between Acme Circus Operating Company, Inc. and Merton H. Sweet, a/k/a Kevin L. Donaldson, during the years 1964 through 1967, inclusive.

SO ORDERED this 16th day of January, 1969 at Tampa, Florida.

/s/ Joseph P. Lieb
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

MOTION TO STAY EFFECTIVE DATE PENDING APPEAL

Filed Jan. 16, 1969

[Caption Omitted in Printing]

NOW COMES the Intervenor, Kevin L. Donaldson, and respectfully moves this Court pursuant to Rule 8(a)(b) Federal Rules of Appellate Procedure, to stay the effective date of its Order in this action pending the disposition of Intervenor's appeal to the United States Court of Appeals for the Fifth Circuit and for that purpose to fix the amount of the bond or security required to be filed by Intervenor.

Louis L. Meldman
Robert E. Meldman
Attorneys at Law
811 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

By /s/ Robert E. Meldman
Robert E. Meldman
Attorney for Intervenor

Local Counsel:
Edward H. Heller
Attorney at Law
615 Marine Bank Building
Tampa, Florida

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

ORDER GRANTING STAY OF EFFECTIVE DATE PENDING APPEAL

Filed Jan. 16, 1969

[Caption Omitted in Printing]

This cause came on to be heard on motion of Intervenor for a stay pending Intervenor's appeal to the United States Court of Appeals for the Fifth Circuit, and it appearing to the Court that Intervenor is entitled to such a stay, it is

ORDERED that the effective date of the Order rendered herein on January 16, 1969, be stayed pending the determination of Intervenor's appeal from such Order, provided that Intervenor file and have approved by this Court on or before January 17, 1969, a personal bond on appeal secured by cash deposit in the sum of $250.00 conditioned in accordance with Rule 8 of the Federal Rules of Appellate Procedure.

Dated this 16th day of January, 1969.

/s/ Joseph P. Lieb
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

NOTICE OF APPEAL

Filed Jan. 16, 1969

[Caption Omitted in Printing]

Notice is hereby given that Kevin L. Donaldson, f/k/a Merton H. Sweet, applicant for intervention above named, by his attorney, Robert E. Meldman, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order denying applicant's motion to intervene as a respondent in order to assert his defenses to enforcement of an Internal Revenue summons, entered in this action on January 16th, 1969.

Louis L. Meldman
Robert E. Meldman
Attorneys at Law
811 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

By /s/ Robert E. Meldman
Robert E. Meldman
Attorney for Applicant for
Intervention

Local Counsel:
Edward H. Heller
Attorney at Law
615 Marine Bank Building
Tampa, Florida

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

MOTION TO CONSOLIDATE
Filed Jan. 17, 1969

[Caption Omitted in Printing]

Comes now the United States of America, by and through its undersigned attorneys, Appellee herein, and moves this Court to consolidate for purposes of appeal the two-captioned cases, and as grounds therefore, would show the Court that the orders appealed from in each of the captioned cases are identical, and the issues on appeal are identical in all respects, and would further show the Court that this motion is made with the consent of the Appellant herein.

EDWARD F. BOARDMAN
United States Attorney

By /s/ Thomas G. Wilson
THOMAS G. WILSON
Assistant United States Attorney

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION

ORDER
Filed Jan. 20, 1969

[Caption Omitted in Printing]

This cause having come before the Court this day on Motion of the United States of America to Consolidate the captioned cases for purposes of appeal, and it appearing that the parties to the appeal are in agreement, that same should be consolidated, and it further appearing to this Court that good cause has been shown why these cases should be consolidated for purposes of appeal, it is, upon consideration,

ORDERED, ADJUDGED and DECREED that the captioned cases are hereby consolidated for purposes of appeal.

DONE and ORDERED, at Tampa, Florida, this 20th day of January, 1969.

/s/ Joseph P. Lieb
UNITED STATES DISTRICT JUDGE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 27341

UNITED STATES OF AMERICA and
JOHN P. GRADY, *Petitioners-Appellees,*

versus

JOSEPH J. MERCURIO and ACME CIRCUS
OPERATING COMPANY, INC., *Respondents,*

versus

KEVIN L. DONALDSON, f/k/a
MERTON H. SWEET, *Intervenor-Appellant.*

Appeals from the United States District Court for the Middle District of Florida

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(October 30, 1969)

Before TUTTLE, WISDOM and BELL, Circuit Judges.

TUTTLE, Circuit Judge: We have here for consideration against phase of the problem arising when a United States District Court is asked by an Internal Revenue special agent to enforce a subpoena requiring the production of records affecting a taxpayer.

The enforcement procedures were commenced under the authorization of Title 26, U.S.C.A., §§7602 and 7604.[1]

The issue was raised in the following manner: (There are actually two cases involved here). On November 25, 1968, petitioners, United States of America and John P. Grady filed a petition to enforce Internal Revenue Service summons against respondent, Joseph J. Mercurio, and against Acme Circus Operating Company, Inc., two former employers of the taxpayer, Kevin L. Donaldson, formerly known as Merton H. Sweet, the taxpayer and the appellant here. Following the issuing by the trial court of its order to show cause, on December 9, 1968, intervenor Donaldson filed his motion to intervene as a respondent and to file an answer. On December 13, respondents filed their answers in which they stated that they were prepared to answer the subpoenas but for the granting of a temporary restraining order which had

[1]"§7602. Examination of books and witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

Section 7604 confers jurisdiction on the district court to require a response upon proper showing of such subpoena.

previously been issued by the trial court "until such time as an order of a court of competent jurisdiction has been issued requiring such compliance." On January 10, 1969, petitioners, United States of America and Grady, filed their opposition to the motion to intervene. On that date, a hearing was had on Donaldson's motion to intervene as respondent. Memoranda of law were filed in support of and in opposition to the motion and the matter was continued until January 16, 1969. On that date the court entered its order denying Donaldson's motion to intervene, and entered its order directing respondent's to comply with the Internal Revenue summons. This order was later stayed pending appeal. Notice of appeal was filed on the same day and the matter is here now for our consideration.

It may clarify the discussion here to begin by stating what is *not* involved. We do *not* have a case in which a subpoena has been issued at the instance of a special agent of the Internal Revenue Service against a *taxpayer* himself, seeking access to *his* records and papers and the right to take his testimony, such as was the case in *United States v. Cohen,* 9 Cir., 1967, 388 F. 2d 464; nor is it a case in which the subpoena seeks to obtain records *of the taxpayer* in the hands of his attorney or accountant, which the courts have deemed the same as if they were in the possession of the taxpayer himself. See *Reisman v. Caplin,* 375 U.S. 440, and this court's recent decision in *Stuart v. United States, et al,* 5 Cir., decided September 17, 1969, — F. 2d —; nor is it a case in which records actually belonging to the *taxpayer* are subpoenaed while in possession of some third person, but where no privilege exists.

To the contrary, what we have here is a subpoena served on two former employers of the taxpayer demand-

ing the production of *their* own records, not the records of the *taxpayer.*

It would seem, upon the most casual observance of this situation, that if the United States were seeking to obtain these records in support of an actual prosecution, following indictment, appellant would have no basis for seeking to have the indictment quashed on the ground of a violation either of Fourth or Fifth Amendment rights, since there would have been no unreasonable search or seizure nor any compulsion of the taxpayer's giving evidence against himself. The issue that is here presented, therefore, depends solely upon the appellant's argument that the court's power to require a response to the subpoena must depend upon the validity of the original subpoena itself; that the Internal Revenue Code authorization for the issuing of a subpoena is restricted to the obtaining of records and testimony where no criminal prosecution is in prospect or in contemplation. By alleging, in its petition to intervene, that the subpoena was not truly issued for one of the purposes authorized under Section 7602, appellant claims he was entitled to intervene to raise this issue, since the employers were not concerned about protecting any rights of appellant.

To sustain his right to intervene, the appellant, in his brief, cites Rule 24(a) of the Federal Rules of Civil Procedure.[2] However, oral argument, appellant relied for his right to intervene solely on *Reisman v. Caplin,*

[2] "(Rule 24(a): Intervention: (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

supra. He claims that he should be given the relief of intervention as a matter of right. In order to test this question, since the trial court did not conduct an evidentiary hearing, we must look to the pleading by which appellant sought to intervene. Once again, it is necessary to point out what the petition does *not* contend: (1) It does not contend that the papers sought to be obtained from the former employer were *his* papers; (2) he does not contend any confidential relationship which under the rules of privilege would entitle him to prevent a disclosure by his former employer of any facts that might be relevant to the inquiry being made. In effect, the petition alleges that he has an interest in the subject matter of the investigation, which, of course, he has, that is, whether or not there has been a deficiency in the tax returns or tax payments made by the taxpayer and/or whether or not such deficiency is of such a nature as to warrant recommendation of prosecution for a crime against the revenues. However, it does *not* allege any fact which, if found in his favor, would warrant the trial court's quashing the subpoena against the third party.

The petition of the United States and John P. Grady was supported by an affidavit by special agents Miller and Grady as follows:

> "In his capacity as special agent, he is assisting in the conduct of an investigation for the purpose of ascertaining the correct income tax liability of Merton H. Sweet, also known as Kevin L. Donaldson, for the years 1964 through 1967 inclusive."

In his motion to intervene, appellant alleges:

> "Petitioner John P. Grady, special agent, and Bruce B. Miller, special agent, New Orleans, Louisiana, are guilty of bad faith both with the court and

the intervenor in asserting that they have been conducting an investigation to ascertain the correct income tax liability of Kevin L. Donaldson, for the calendar years 1964, 1965, 1966 and 1967.

"John P. Grady is a special agent assigned to the intelligence division, Internal Revenue Service, Tampa Florida, and Bruce B. Miller is a special agent assigned to the Intelligence Division, Internal Revenue Service, New Orleans, Louisiana.

"The function of the Intelligence Division is to enforce the criminal statutes applicable to tax laws by developing information concerning alleged criminal violations thereof.

"Special Agent Bruce B. Miller was assigned the investigation of Kevin L. Donaldson for the calendar years 1964, 1965, 1966 and 1967 for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States and special agent John P. Grady is assisting special agent Miller in this investigation."

These, then, are the allegations of the complaint upon which the appellant bases his contention that the issuance of a subpoena in support of such an investigation is beyond the authority contained in Section 7604. In making this contention, appellant relies heavily upon language of the Supreme Court in *Reisman v. Caplin,* supra. The particular language relied upon is as follows:

"Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground. This would

include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, Boren v. Tucker, 9 Cir., 239 F. 2d 767, 772-773, as well as that it is protected by the attorney-client privilege, Sail v. U. S., 8 Cir., 228 F. 2d 682. In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene. See in Re: Albert Lindley Lee Memorial Hospital, supra, and Corbin Deposit Bank of Corbin, Ky. v. U. S. supra. . . ."

Appellant contends that since the function of the special agents is to investigate to see whether a crime has been committed, no subpoena can be issued under the authority of Section 7602 because of the language of the Reisman opinion *"this would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution,"* citing *Boren v. Tucker,* supra.

This argument goes too far. In the first place, it will be noted that under the express language of the Act, the subpoena may be served upon the taxpayer himself or upon any other person having records relevant to the inquiry. It is also apparent that *there is no express limitation on the face of the statute* that the power to make the investigation to — ascertain "the correctness of any return, making a return where none has been made, determining the liability for any person for any internal revenue tax" limits the inquiry to such as will result *solely* in a proposed deficiency in tax or deficiency plus civil fraud penalties. Nor is there any limitation expressed on the face of the act that the inquiry may not be made if

"determining the liability of any person for any internal revenue tax" or "ascertaining the correctness of [a] return" is made to assist the internal revenue service agents in determining *whether there is sufficient evidence that a crime against the revenues has been committed to warrant a recommendation* to the Justice Department that the case be marked for prosecution.

The investigation made by a special agent of the Internal Revenue Service, of which by this time the courts may take judicial notice, see footnote 3 in *Wild v. United States,* 9 Cir., 362 F. 2d 206, at page 208,[3] includes the duty of "developing information concerning alleged criminal violations, evaluating allegations and indications of such violations to determining investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes." Most significant, it seems to us, is the citation by the Supreme Court in *Reisman* as the basis for its statements relative to criminal prosecutions, of the case of *Boren v. Tucker,* 9 Cir., 239 F. 2d 767. In the

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[3]This footnote is as follows:

"30 Fed. Reg. 9399-9400 (July 28, 1965), 1966 CCH Stand. Fed. Tax Rep. §5988, which provides:

"1118.6 INTELLIGENCE DIVISION.

"The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment, and excise tax laws (except those relating to alcohol, tobacco, narcotics, and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U. S. Attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases."

Boren case, the Ninth Circuit enforced the subpoena. In doing so, it distinguished the case of *United States v. O'Connor,* D.C. Mass., 1953, 118 F. Supp. 248. The *Boren* opinion pointed out that in *O'Connor,* an indictment had already been returned against the taxpayer; that there was no other pending investigation; and the special agent was used as a means to cause a subpoena to issue as if the case were still in the investigatory stage. Pointing out the difference between the *O'Connor* case and that pending before it, the Court of Appeals for the Ninth Circuit, in *Boren,* said:

> "It should be noted that the statute under consideration, by its language, does not limit the examination it authorizes solely to the issue of correctness. Section 7602 authorizes an examination for the purpose of 'ascertaining the correctness,' 'determining the liability of any person for any internal revenue tax,' 'or collecting any such liability.' If a fraudulent tax return changes a taxpayer's liability, how could that fact be established without someone being required to come to a conclusion as to a possible criminal prosecution? Once an error has been established, it seems necessary for the examiner to come to some conclusion, one way or the other, as to whether there existed the possibility of criminal prosecution in the future. If no possibility exists, then one rule to determine liability comes into play — i.e., what tax should have been paid when the tax is correctly determined. If a possible criminal prosecution exists, then there is a possibility of another rule being used, the 50% penalty, to determine the correct tax. While it is true that once a possible criminal prosecution comes into existence there can be no settlement of tax until that possibility has been ruled out, yet the existence of the possibility of criminal prosecution does not necessarily mean

that there will be criminal prosecution. The ultimate decision may be, (1) civil liability for the correct tax, (2) liability for the tax plus penalty, (3) criminal prosecution, or (4) both the penalty and the criminal prosecutuion. Helvering v. Mitchell, supra; 26 U.S. C.A. §6653(b), 7201 et seq.

"In truth, we presume the 'Secretary or his delegate' would be unfaithful to his statutory responsibilities if in every examination, once an incorrect return has been demonstrated or established, he did not come to some preliminary conclusion as to whether there existed facts sufficient upon which to base a possible criminal prosecution, without coming to any conclusion as to whether there should be a criminal prosecution."

This court has recognized the same principle as stated in *Boren* in *Venn v. United State,* 5 Cir., 1968, 400 F. 2d at 210.

As we construe the motion to intervene, it simply says that since the subpoena has been issued by a special agent whose duty it is to aid in developing information relative to a possible prosecution this would amount to an "improper purpose of obtaining evidence for use in a criminal prosecution," within the language of the Supreme Court in *Reisman.*

In view of the fact that there is no allegation in the complaint that even the special agent had recommended a prosecution, much less that the Internal Revenue Service had sent the case to the Department of Justice for the purpose of presentation to a grand jury, the investigation being made by the special agents would still, in our view, come within the authority granted within 7602, as described in the *Boren* opinion. A case which strongly sup-

ports this view is *In Re-Magnus, Mabee, Reynard, Inc.*, 2 Cir., 1962, 311 F. 2d 12.

We think it essential to bear in mind what seems to be so often unspoken in discussion of the power given under 7602 and 7604(b). Before indictment but after a potential criminal investigation commences, the courts have been somewhat troubled by the question of how much interrogation of the *taxpayer* is *constitutionally* permissible. Of course, after indictment, no subpoena can run against the accused.

There is no *constitutional* question as to the power of the Service to question, or subpoena records of *third parties* either before or *after* indictment. In cases in which the courts inveigh against the use of 7602 by a special agent, broad language is sometimes used to limit the authority because this effort has usually been made to obtain evidence from the taxpayer. The language is not apt and, is not controlling, if the subpoena power is being used to compel evidence by *third parties*. We have merely a problem of statutory construction of Section 7602.

There being no right which the appellant asserts that he could present to warrant the trial court's refusal to enforce the subpoena, the right to intervene has not been established. The language in *Reisman* "in addition, third parties might intervene to protect their interest, or in the event the taxpayer is not a party to the summons before the hearing officer, he too may intervene" is, of course, limited to the right to intervene if the person seeking the right can demonstrate to the court that he has interests to protect. Here, Donaldson's petition has alleged no such interest.

The trial court correctly denied the motion to intervene. The judgment is AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1969

No. 27341

D. C. Docket No. Civ. 68-490 & 68-491-T

UNITED STATES OF AMERICA and
JOHN P. GRADY,

Petitioners-Appellees,

versus

JOSEPH J. MERCURIO and ACME CIRCUS
OPERATING COMPANY, INC.,

Respondents,

versus

KEVIN L. DONALDSON, f/k/a
MERTON H. SWEET,

Intervenor-Appellant.

Appeals from the United States District Court for the Middle District of Florida

Before TUTTLE, WISDOM and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

It is further ordered that intervenor-appellant pay to petitioners-appellees, the costs on appeal to be taxed by the Clerk of this Court.

October 30, 1969

Issued as Mandate:

Supreme Court of the United States

No. 942 ---- , *October Term, 19* 69

Kevin L. Donaldson fka Merton H. Sweet,

Petitioner,

v.

United States et al.

ORDER ALLOWING CERTIORARI. Filed February 27 ---------- , 19 70.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.